Supreme Court, U. S.
FILED
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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-665

JAMES L. PICKERING,
Petitioner-Appellant,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent-Appellee.

JURISDICTIONAL STATEMENT

JAMES L. PICKERING, *Pro Se*
Petitioner-Appellant
Hand Road
Chaffee, New York 14030

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IN THE

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October Term, 1979

No. .....

JAMES L. PICKERING,
Petitioner-Appellant,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent-Appellee.

Jurisdictional Statement

Rule 15,1 (a). United States Tax Court Memo T.C.Memo 1978-427 is cited as is Par 1 & 2 of Court of Appeals, Second Circuit Order, Judgement and Decree enumerated and dated sixth day of September, 1979.

Rule 15,1 (b). This appeal is brought pursuant to Art. I Amendments to Constitution of the United States and Art. III Sect. 2 of Constitution of the United States, from Order Judgement and Decree of Second Circuit United States Court of Appeals No. 79-4088 and Decision United States Tax Court 6760-75 involving Petitioners Right to trial by Jury and equal protection of the law in Tax Court vs. Power of Congress to suppress Trial by Jury in Tax Court and Petitioners Unenumerated right to use a method other than Diminution of Fair Market Value which is protected by Amendment X of Constitution of the United States and Warren v. CIR C.C.A. 1940 110 F2D 723 where Decree No. 79-4088 is dated 6 Sept.

1979 and 6760-75 United States Tax Court Decision is dated 23rd day of February 1979 and where Notice of Appeal was filed in 6760-75 in United States Tax Court on 4 April 1979 and Notice of Appeal in No. 79-4088 United States Court of Appeals, Second Circuit was filed on 17 Sept. 79 by Certified mail No. 162869 from post office Chaffee, New York and on Defendant Commissioner of Internal Revenue on 18 Sept 79 by Certified Mail No. 162870 from Chaffee Post Office. Petitioner personally not an attorney and knows of no case law to answer Rule 15 (b) (iv).

Rule 15 (b) (v), Constitutionality of Title 26 Sect. No. 7453 United States Code is challenged as an unnecessary and improper extension of Art. I Sect. 18 of Constitution of the United States, as well as being in conflict with principles set forth in Title 28 No. 2072 par 2 United States Code and Amendment 7 of Constitution of the United States. It reads "The proceedings of the Tax Court and its divisions shall be conducted in accordance with such rules of practice and procedure (other than rules of evidence) as the Tax Court may prescribe and in accordance with the rules of evidence applicable in trials without a jury in the United States District Court of District of Columbia. (Aug. 16, 1954 c 736 68A Stat 884)"

Rule 15 (c), Constitutionality of Title 26 No. 7453, applicability of the petitioners rights, as set forth against the states in Amendment XIV Sect. 1, against the United States under Amendment X of Constitution of the United States and principles of Warren v. CIR (1940) v. 6760-75 U.S. Tax Court decision in the matter computing the loss as well as Failure of Tax Court to establish a basis in property at 203 Hamburg Street based upon Erie County Surrogate Court records which are part of Petitioners exhibits. Constitutionality of Tax

Court's use of "Exactitude" in view of Art. V Constitution and Amendments VIII and I of Constitution of the United States.

Rule 15 (d), Case involves casualty loss via vandalism, Petitioners basis and methods of computing the loss where petitioners basis was established by Public Record and input evidence but Public record basis was not awarded and computation of loss under principles of Warren v. CIR by Petitioner which were disallowed by Tax Court, as well as Petitioners rights under Art. I, VII, VIII, IX, X and XIV. Documentation as evidence was used for vandalism P. basis and calculation of loss.

Art. I raised in pleadings.

Art. VII raised Via Art. I and treated by Tax Court as Motion, and in pleadings.

Art. VIII raised in oral argument before the United States Court of Appeals for the Second Circuit. 79-4088.

Art. IX raised In Reply in United States Tax 6760-75 and in oral argument before the United States Court of Appeals for the Second Circuit No. 79-4088.

Art. X Raised in oral argument before the United States Court of Appeals for the Second Circuit, No. 79-4088.

Art. VI Raised in Pleadings 6760-75 United States Tax Court.

Art. V Raised in pleadings United States Tax Court 6760-75.

Each of the enumerated Arts. is an Amendment to the Constitution of the United States. Except to deny the motion for trial by jury Tax Court took no action on the Constitutional issues, and Court of Appeals took no action on any of the Constitutional issues raised.

Court of Appeals sustained findings of Tax Court citing Dorl v. Commissioner, 507 F.2D 406, 407 (2nd Cir. 1974) in its Affirmation of Tax Court Decision in 6760-75.

Rule 15 (f), Title 26 Sect. 7453 United States Code is held to be unconstitutional as an unnecessary and improper extension of Art. I Sect. 18 of the Constitution of the United States and in conflict with Petitioners Civil Rights under amendments I, V, VII, VI, IX, X and XIV of Constitution of the United States.

No briefs are necessary the mandate of the people in the Constitution itself is sufficiently clear to support the unconstitutionality of Title 26 Sect. 7453 of United States Code. It should be noted however that under Amendment IX where a certain power is prohibited to the States it is also prohibited to the United States unless there is a specific designation of that power to the United States elsewhere in the Constitution and that right against the use said prohibited power by the United States is an unenumerated right protected by Amendment IX. An example of this is the unequal protection of the law by the IRS in this case as was cited by Petitioners demand that Warren v. CIR be the ruling case law since petitioner still holds the property, and the failure of both Tax Court and the Second Circuit Court of Appeals to follow that mandate.

JAMES L. PICKERING,
9/29/79.

Affiated Service on Solicitor General Air Mail Certified Chaffee New York Post Office No. 756222 3 Oct 79 Jurisdictional Statement.

JAMES L. PICKERING,

Notice of Appeal to the United States Supreme Court

UNITED STATES COURT OF APPEALS

For the Second Circuit

79-4088

JAMES L. PICKERING/*Pro Se*,
Appellant/Petitioner,

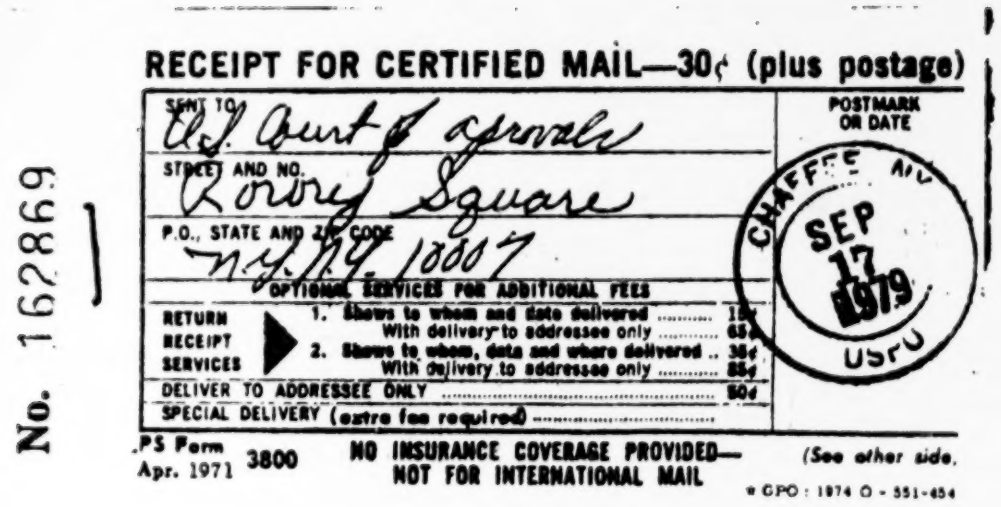
v.

COMMISSIONER OF INTERNAL REVENUE.

Please take notice, that the above named Petitioner/Appellant hereby appeals to United States Supreme Court from the Order, Judgment and Decree dated on the sixth day of September 1979 of the Second Circuit Court of Appeals in this Action, entered in the office of the Clerk of said Court of appeals, Second Circuit on the sixth day of September, 1979 or thereabouts, and from each and every part thereof.

This appeal is taken to the Supreme Court of the United States by authority of Art I amendments to Constitution of the United States and Art III, Sect 2 of Constitution of the United States.

JAMES L. PICKERING, 9-13-79
James L. Pickering, *Pro Se*,
Hand Road,
Chaffee, New York 14030.



RECEIPT FOR CERTIFIED MAIL—30¢ (plus postage)

No. 162869

SENT TO: U.S. Court of Appeals
STREET AND NO.: Foley Square
P.O., STATE AND ZIP CODE: N.Y. N.Y. 10007

POSTMARK OR DATE: CHAFFEE AV SEP 17 1979 USPO

OPTIONAL SERVICES FOR ADDITIONAL FEES

RETURN RECEIPT SERVICES
1. Shows to whom and date delivered ..... 15¢
With delivery to addressee only ..... 65¢
2. Shows to whom, date and where delivered .. 35¢
With delivery to addressee only ..... 85¢

DELIVER TO ADDRESSEE ONLY ..... 50¢
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PS Form 3800 Apr. 1971 — NO INSURANCE COVERAGE PROVIDED— NOT FOR INTERNATIONAL MAIL — (See other side.)

* GPO : 1974 O - 551-454

RECEIPT FOR CERTIFIED MAIL—30¢ (plus postage)

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SENT TO: Commissioner of Int. Rev.
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P.O., STATE AND ZIP CODE: Washington D.C. 20224

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OPTIONAL SERVICES FOR ADDITIONAL FEES

RETURN RECEIPT SERVICES
1. Shows to whom and date delivered ..... 15¢
With delivery to addressee only ..... 65¢
2. Shows to whom, date and where delivered .. 35¢
With delivery to addressee only ..... 85¢

DELIVER TO ADDRESSEE ONLY ..... 50¢
SPECIAL DELIVERY (extra fee required) .....

PS Form 3800 Apr. 1971 — NO INSURANCE COVERAGE PROVIDED— NOT FOR INTERNATIONAL MAIL — (See other side)

* GPO : 1974 O - 551-454

Order, Judgment and Decree of the United States Court of Appeals, Second Circuit

UNITED STATES COURT OF APPEALS

Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the sixth day of September, one thousand nine hundred and seventy-nine.

Present: HONORABLE IRVING R. KAUFMAN,
Chief Judge.
HONORABLE JON O. NEWMAN,
HONORABLE AMALYA L. KEARSE,
Circuit Judges.

JAMES L. PICKERING,

Appellant,

v.

COMMISSIONER OF INTERNAL REVENUE,

Appellee.

79-4088

Appeal from the United States Tax Court.

This cause came on to be heard on the transcript of record from the United States Tax Court, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the Judgment of the Tax Court be and it hereby is AFFIRMED.

1. A taxpayer who claims a casualty loss deduction carries the burden of proving the amount of the claimed loss. *Rosenthal v. Commissioner*, 416 F.2d 491, 498 (2d Cir. 1969). Since Mr. Pickering did not in fact repair the Hamburg Street property following the 1973 acts of vandalism, the Tax Court properly rejected his estimates of the cost of repair and insisted instead upon proof of the diminution in the building's market value attributable to the casualty. *Farber v. Commissioner*, 57 T.C. 714, 719 (1972). In the absence of such proof, the Tax Court's close approximation of the minimum value of the loss suffered satisfies the requirements of *Cohan v. Commissioner*, 39 F.2d 540, 544 (2d Cir. 1930), and is not clearly erroneous.

2. It is well established that a taxpayer has no right to a jury trial in the Tax Court when contesting a deficiency assessed by the Commissioner. *Dorl v. Commissioner*, 507 F.2d 406, 407 (2d Cir. 1974).

IRVING R. KAUFMAN,
Chief Judge,
JON O. NEWMAN,
AMALYA L. KEARSE,
Circuit Judges.

Decision of the United States Tax Court
Entered February 23, 1979

UNITED STATES TAX COURT

JAMES L. PICKERING,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Docket No. 6760-75

Pursuant to the opinion of the Court filed October 26, 1978, and incorporating herein the facts recited in the respondent's computation as the findings of the Court, it is

ORDERED and DECIDED: That there is a deficiency in income tax due from the petitioner for the taxable year 1973 in the amount of $542.26.

(Signed W. M. DRENNEN),
Judge.

Entered: FEB 23 1979

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Opinion of the United States Tax Court
Filed October 26, 1978

T.C. Memo. 1978-427

UNITED STATES TAX COURT

JAMES L. PICKERING,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Docket No. 6760-75.
Filed October 26, 1978.

Petitioner's allowable losses from vandalism determined.

James L. Pickering, *pro se.*

Kenneth Bersani, for the respondent.

DRENNEN, *Judge:* Respondent determined a deficiency in petitioner's 1973 income tax of $927.26. The only issue for our decision is whether petitioner is entitled to casualty loss deductions of $1,000 and $3,000 under section 165, I.R.C. 1954,[1] as a result of two break-ins to his rental property during 1973.

---

[1] All section references are to the Internal Revenue Code of 1954, as amended and in effect in the year in issue, unless otherwise indicated.

FINDINGS OF FACT

Petitioner James L. Pickering resided in Chaffee, N.Y., when he filed his petition.

Petitioner timely filed a joint income tax return for 1973 with his wife, who is not a party to this case, with the North Atlantic Service Center, Andover, Mass.

During 1973 petitioner owned a two and one-half story frame dwelling on a lot 25′ by 112½′ at 203 Hamburg Street, Buffalo, N.Y. The Hamburg Street property contained three rental units: A front downstairs apartment, an upstairs and downstairs rear apartment, and a front upstairs apartment.

Petitioner acquired the Hamburg Street property by gift from his wife's aunt, Mary F. Smietana on September 27, 1967. The deed of transfer stated a consideration of "$1.00 and no more." However, upon the request of Mary F. Smietana's lawyer petitioner paid back property taxes on the Hamburg Street property totaling $240.86.

Mary F. Smietana had acquired the Hamburg Street property by devise under the will of her mother, Maryanna Smietana, who had purchased the property in 1925. Mary F. Smietana received the property on or about May 26, 1962, the date of her mother's death.

According to an appraisal of Maryanna Smietana's estate made on December 6, 1962, the fair market value of the Hamburg Street property was $8,500. The appraisal was done primarily for the purpose of determining whether the estate was subject to New York estate taxes. No division was made between the value of the building and the underlying land. (Subsequent real estate tax assessments also have not been divided between the building and land.)

While the Hamburg Street property was in Mary F. Smietana's hands different apartment units were rented. The rear apartment was rented throughout 1962 to 1967, the front upstairs was rented for the early part of this period, and the front downstairs apparently was vacant. Also, while the Hamburg Street property was in Mary F. Smietana's hands the only capital improvements made to the property by Smietana were the installation of a shower in the apartment and of three bathroom fixtures (apparently a toilet, bathtub and sink) in the rear apartment.

When petitioner acquired the Hamburg Street property in 1967, only the rear apartment was being rented, and petitioner immediately began renovating. All the work was performed by petitioner and his family. None of those who helped petitioner charged him for their services.

Petitioner made the following renovations to the front downstairs apartment between 1967 and 1969:

(a) Because of their deteriorated condition, he removed and replaced the ceilings in two bedrooms and the bathroom. He also removed two walls entirely to make a larger bedroom and larger bath. The original plaster walls were replaced with plaster board.

(b) In the rear of the apartment two doorways were walled over with two-by-fours and plaster board to comply with the City of Buffalo Housing Code. All electrical fixtures were replaced with updated equipment. Several window panes were replaced and in one instance an entirely new window frame was installed.

(c) The bathroom, after the new walls were put in, was completely refurbished. New floor and wall tiles, plumbing, fixtures (including a new toilet, bathtub, and sink), electrical fixtures and outlets, and window panes were installed. Insulation was placed in the external wall of the bathroom.

(d) In the bedroom electrical fixtures and outlets were installed and a cracked window was fixed.

(e) In the kitchen-dinette area, a gas heater was repositioned and new fire-retardant material placed underneath. The gas line to the heater was recaulked to seal leaks. New plaster board and electrical fixtures and outlets were installed. A new sink was put in. The doors were refinished with fire retardant tempered masonite. Door frames were installed on all doors.

(f) In the back hall leading from the downstairs apartment the walls were fire-retarded as were the ceilings, walls, and floor of a large closet located under the rear stairs.

(g) New locks were placed on the front and rear doors. The front steps were reconstructed. New shutters were placed on all windows.

Most, if not all, of the rear apartment also was repainted.

Following are the renovations petitioner made in the front upstairs apartment between 1967 and 1969:

(a) A new water tank was installed. A bedroom was converted into a bathroom. All new fixtures were installed (including toilet, bathtub and sink). Piping was run from the water tank to the new bathroom. A new sewer line was installed from the bathroom to the basement. A special section of wall was installed around the new tub. New insulated copper piping was installed for all the fixtures.

(b) The walls of all the other rooms were repainted.

(c) New drain lines were installed under the kitchen sink.

(d) One pane of a storm window was replaced with an extra pane that had been stored in the basement.

(e) Some electrical fixtures and outlets were replaced.

(f) The attic door was fire retarded.

In the upper rear apartment these renovations were made between 1967 and 1972:

(a) A new doorway was cut so that there would be two entrances. A new door and frame were installed and the plaster surrounding the doorway refinished.

(b) In the rear of the house a new chimney was built up to five feet above the roof. The chimney connected to a new boiler that was installed in the basement. The baseboard heat was repaired.

(c) Many electrical fixtures and outlets were replaced. The gas and water pipes in the kitchen were repaired. A gas heater was installed.

(d) Two broken windows were replaced.

(e) Several pipes in the bathroom were replaced because they had rusted out.

Petitioner spent $4,500 altogether in making these renovations.

On or about February 3, 1973, individuals broke into the Hamburg Street property and vandalized the front upstairs apartment, breaking windows and shooting a bow and arrow in the apartment.

On or about February 4, 1973, a fire occurred in the front upstairs apartment of the Hamburg Street property, causing damage to a stuffed chair, paneling, framework around the doors, and the floor.

On or about June 6, 1973, individuals again broke into the Hamburg Street property and vandalized all the apartments, breaking the remaining windows, door panels, ripping piping out of the walls, and smashing all the circuit breakers.

In late February 1973 the City of Buffalo began a proceeding to have the Hamburg Street property demolished because of housing code violations. Sometime in 1974 petitioner consented to demolition of the building. It later was demolished.

Petitioner made no repairs to the property following the fire and vandalism losses. The property remained untouched until it was demolished. Nor did the petitioner have an independent appraisal made of the damage before the property was demolished.

During 1973 the assessed value of the Hamburg Street property (land and improvements) was $2,800. At this time the equalization rate for the City of Buffalo was 54 percent.

Petitioner claimed a casualty loss of $5,000 on his 1973 income tax return, $1,000 for the first vandalism damage, $1,000 for the fire damage, and $3,000 for the second vandalism damage.

In the notice of deficiency respondent disallowed the entire amounts claimed for losses from vandalism but did not disallow the claimed fire loss.

ULTIMATE FINDING OF FACT

Petitioner sustained vandalism losses of $250 and $1,500 as a result of two separate break-ins at the Hamburg Street property in 1973.

OPINION

Petitioner claims he is entitled to deductions of $1,000 and $3,000 for casualty losses under section 165(a) and (c) as a result of two acts of vandalism to his Hamburg Street rental property in 1973. Respondent concedes that vandalism damage constitutes a casualty but argues that petitioner has failed to prove the factual elements of a loss. Specifically respondent contends that petitioner has not established the nature of his losses, the amount of the losses, or his adjusted basis in the loss property. Since these are factual issues respondent is correct that petitioner bears the burden of proving that respondent's determination was wrong. Rule 142(a), Tax Court Rules of Practice and Procedure; *Welch v. Helvering*, 290 U.S. 111 (1933).

Respondent's concern with the nature of the loss is easily disposed of by our finding that vandalism resulted from the break-ins during 1973. Although conceding that the break-ins occurred, respondent contests the fact of vandalism because petitioner did not have an independent individual testify with regard to the property's damage and the property apparently was demolished by the City of Buffalo before petitioner's 1973 return was audited. Petitioner, appearing *pro se*, did not foresee this problem of proof and offered only his testimony and his son's testimony with regard to the nature of the loss. Disinterested testimony, though helpful to the fact finder, is not required to substantiate a loss. *Keith v. Commissioner*, 52 T.C. 41, 49-50 (1969).

We found petitioner's testimony to be candid, forthright, and credible. According to petitioner, the February 1973 break-in resulted in broken windows and damage caused by bow and arrow in the "upstairs apartment";[2] a short time later, there was a fire that damaged primarily a stuffed chair, paneling, framework around the doors, and the floor, all in the "upstairs apartment"; but the major damage was done during the June break-in—throughout the building (1) the vandals had taken a sledge hammer and broken every window, every door panel, and every panel between the studs; (2) they had ripped piping out of the walls; (3) they had smashed all the circuit breaker panels, and some circuit breakers were stolen. We accept petitioner's testimony that he sustained losses in 1973 as a result of two acts of vandalism.[3]

The amount of a casualty loss sustained is measured by the difference between the fair market value of the loss property immediately before and after each casualty, limited to the adjusted basis of the loss property. Sec. 1.165-7(b)(1), Income Tax Regs. Two methods of valuation are endorsed by the regulations to measure the loss in fair market value. One is by appraisal and the other is by the cost of repairs. Sec. 1.165-7(a)(2), Income Tax Regs.

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[2] Petitioner's reference to the "upstairs apartment" apparently is to the front upstairs apartment.

[3] Petitioner's testimony is consistent with complaints he filed with the City of Buffalo police and with his prior testimony in a proceeding brought by the State of New York to have the Hamburg Street property demolished because of housing code violations. Also, an inspector's testimony at that proceeding generally corroborates petitioner's testimony here.

We do not, however, rely on the testimony of petitioner's son, Jonathan E. Pickering. Jonathan testified that he never had told petitioner that he had seen any damage at the Hamburg Street property until the day of trial itself. This casts doubt upon the accuracy of his testimony.

Petitioner, a licensed master electrician with some casual construction experience, tried to establish the amount of his vandalism losses by giving his opinion of the cost of repairing the damage. Section 1.165-7(a)(2)(ii), Income Tax Regs., provides that the cost of repairs to the property damaged is acceptable as evidence of the loss of value if, among other requirements, "the amount spent" for such repairs is not excessive, and the value of the property "after the repairs" does not exceed the value of the property immediately before the casualty. These requirements have been interpreted to mean repairs and expenditures must actually be made to use the cost of repairs method to ascertain the amount of loss. *Farber v. Commissioner,* 57 T.C. 714 (1972); *Lamphere v. Commissioner,* 70 T.C. 391 (1978). We therefore cannot consider petitioner's estimated cost of repairs to determine the amount of loss.

According to section 1.165-7 (a)(2)(i), Income Tax Regs., in determining the amount of loss the fair market value of the property immediately before and after the casualty "shall generally be ascertained by competent appraisal."[4] Petitioner did not have an independent appraisal made of the loss property at any time in 1973 and his own testimony did not center on the pertinent fair market values of the property. Nevertheless, it is apparent that petitioner suffered some loss as a result of the break-ins. As such, we feel compelled to approximate the amount thereof from other facts of record in

[4] This is not to say that a taxpayer is required to hire an appraiser, which petitioner thought would be unconstitutional. We need not consider the constitutional question because an independent appraisal is not required. The cost of actual repairs or a competent appraisal by the taxpayer are acceptable as evidence of the loss. Sec. 1.165-7(a)(2), Income Tax Regs.; *Keith v. Commissioner,* 52 T.C. 41 (1969).

accordance with our best judgment. See *Cohan v. Commissioner,* 39 F. 2d 540 (2d Cir. 1930); *cf. Millsap v. Commissioner,* 46 T.C. 751, 760 (1966), affd. without discussion of this issue 387 F. 2d 420 (8th Cir. 1968), wherein we observed:

> There have been cases where a failure of proof on the issue of basis has been overlooked to permit the allowance of a small casualty loss deduction where it could reasonably be inferred from other facts of record that the allowed amount did not exceed basis * * *.

The record clearly shows extensive damage to the windows, doors, and walls as a result of the acts of vandalism. Bearing against petitioner because his inexactitude is of his own making, we find that the loss in fair market value as a result of the vandalism in February 1973 was $250 and as a result of the vandalism in June 1973 was $1,500. We believe there can be little doubt that the windows, doors, and walls destroyed were worth $1,750. The evidence is insufficient to establish any further loss.

The final element of a casualty loss deduction is the adjusted basis of the loss property. Under section 165(b) and section 1.165-7(b)(1), Income Tax Regs., the loss sustained is deductible only up to the adjusted basis of the property for determining loss from the sale or disposition of the property.

Numerous uncertainties preclude an exact determination of petitioner's adjusted basis in the loss property from the record in this case. Petitioner apparently acquired the property by gift (or net gift, since he paid back property taxes) so his starting basis would be the lower of the donor's basis or the property's fair market value at the time of the gift. Sec. 1015. We have no evidence of the property's fair market value at the time of the gift. The only evidence we

have with respect to the donor's (Mary F. Smietana) basis is that she inherited the property in 1962 and that it was appraised at that time at $8,500. See section 1014 for basis of inherited property. We have no evidence of the breakdown between land and improvements and no means of determining allowable depreciation subsequent to 1962. These gaps in the evidence prevent petitioner from relying upon his starting basis to support his losses in this case. *Millsap v. Commissioner, supra.*

Still, additions to petitioner's basis in the building after his acquisition of it convince us that there was sufficient basis to allow a deduction for the losses we have found were sustained. Petitioner testified that his out-of-pocket investment in the capital improvements to the building from September 1967 to 1972 was $4,500,[5] a fact conceded by respondent on brief. This increases the basis of the building. Sec. 1016(a)(1). Basis also must be reduced for the greater of depreciation allowed or allowable. Sec. 1016(a)(2). In addition to several years of depreciation, basis must be reduced by the fire loss allowed in 1973 to determine the adjusted basis as of the time of the second vandalism loss. In the absence of evidence concerning the depreciation of the building,[6] petitioner has not

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[5] Checks and receipts totaling considerably more ($6,217.18) were introduced into evidence. Petitioner admitted that certain checks and receipts might not be for materials used in renovation, but our finding that the losses sustained amounted to only $1,750 obviates an inquiry for further basis.

[6] See *Shillito Realty Co. v. Commissioner*, 8 B.T.A. 665 (1927) (additions to building made in remodeling had a depreciable life equal to the remaining life of the building of which they were an inseparable part), affd. without discussion of this point 39 F.2d 830 (6th Cir. 1930).

established his exact adjusted basis. Nevertheless, we believe the evidence establishes that there was sufficient remaining basis as of 197[illegible] to permit a deduction for the $1,750 in vandalism losses sustained. Starting with the $4,500 in improvements, and reducing that by the $1,000 fire loss allowed by respondent, petitioner's basis before depreciation adjustments as of 1973 was $3,500. Our judgment is that at least half of this amount must have remained undepreciated—petitioner had held the building for only 5-6 years—and thus petitioner's adjusted basis in the building was sufficient to permit allowance of the $250 and $1,500 losses we have found were sustained.

Decision will be entered under Rule 155.

Demand for Jury Trial

UNITED STATES TAX COURT

JAMES L. PICKERING,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

6760-75.

Pursuant to Art I amendments to Constitution of The United States and amendments 6/7 of Constitution of the United States and Based upon Ltr dtd 8 March 1977 Stephan M. Miller by K. Bersani Attorney demand is made for Trial by Jury.

JAMES L. PICKERING, *Pro Se.*

26 March 1977
DENIED 3/29/77 SERVED APR. 7-77

Per General Docket 6760-75
United States Tax Court

Supreme Court, U.S.
FILED
DEC 6 1979

No. 79-665

In the Supreme Court of the United States

OCTOBER TERM, 1979

JAMES L. PICKERING, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-665

JAMES L. PICKERING, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner seeks review of the decision below in this federal income tax case disallowing in part a claimed casualty loss deduction.[1]

The pertinent facts are undisputed and may be summarized as follows: On his income tax return for 1973, petitioner claimed a casualty loss deduction of $4,000 based on damage from vandalism during that year to certain rental property then owned by him (Pet. 14-15). On audit, the Commissioner of Internal Revenue disallowed the loss, asserting that petitioner had failed to establish the facts necessary to support the

[1]Although petitioner filed a "notice of appeal" in the court of appeals and a "Jurisdictional Statement" in this Court, he has not suggested any basis for invoking the appellate jurisdiction of this Court. Pursuant to 28 U.S.C. 2103, we therefore treat the Jurisdictional Statement as a Petition for a Writ of Certiorari.

claimed deduction (Pet. 16). In this suit brought by petitioner in the Tax Court for redetermination of the resulting deficiency, the Tax Court found that petitioner had failed to demonstrate the amount of his loss by either of the two methods sanctioned in the applicable Treasury Regulations. Specifically, the Tax Court ruled that petitioner had not substantiated the loss by repairing the damage and showing the cost of such repairs, and had failed to demonstrate the decline in the value of the property resulting from the casualty. See Treasury Regulations on Income Tax (1954 Code), 26 C.F.R. 1.165-7(a)(2). Nevertheless, the Tax Court approximated the amount of the loss pursuant to the rule of *Cohan* v. *Commissioner*, 39 F. 2d 540, 544 (2d Cir. 1930), and allowed petitioner a casualty loss deduction of $1,750 (Pet. 18-19). The court of appeals affirmed (Pet. 7-8).

1. Petitioner challenges (Pet. 2, 4) the constitutionality of Section 7453 of the Internal Revenue Code of 1954 (26 U.S.C.), which provides that Tax Court proceedings are to be conducted "in accordance with the rules of evidence applicable in trials without a jury in the United States District Court of the District of Columbia." Petitioner's attack appears to be directed to the Tax Court's denial of his request for a jury trial (Pet. 22). It is, however, settled beyond question that a taxpayer is not entitled to a jury trial in the Tax Court. *Phillips* v. *Commissioner*, 283 U.S. 589, 599 n.9 (1931); *Dahl* v. *Commissioner*, 526 F. 2d 552 (9th Cir. 1975); *Dorl* v. *Commissioner*, 507 F. 2d 406, 407 (2d Cir. 1974); *Olshausen* v. *Commissioner*, 273 F. 2d 23, 28 (9th Cir. 1959), cert. denied, 363 U.S. 820 (1960).

2. The various constitutional provisions cited by petitioner (Pet. 3-4) do not bear upon the question whether the Tax Court correctly imposed on him the burden of establishing his entitlement to the claimed

deduction. See *Welch* v. *Helvering*, 290 U.S. 111, 115 (1933). Given petitioner's failure to establish the actual diminution in value of his property resulting from vandalism during the year in question, the Tax Court properly limited his deduction to the amount it estimated as his actual loss pursuant to the rule of *Cohan* v. *Commissioner*, *supra*.[2] The courts below were more than fair in allowing petitioner a deduction for the approximated casualty loss of $1,750.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

DECEMBER 1979

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[2]In *Cohan*, the court held that where the Tax Court is persuaded that the taxpayer is entitled to a deduction even though he has failed to establish the precise amount, it may allow an estimated amount, "bearing heavily if it chooses upon the taxpayer whose inexactitude is of its own making." *Cohan* v. *Commissioner*, *supra*, 39 F. 2d at 544. *Warren Service Corp.* v. *Commissioner*, 110 F. 2d 723 (2d Cir. 1940), upon which petitioner relies (Pet. 1-4), is inapposite. That case stands only for the well-established proposition that, in the absence of a sale or exchange, the mere diminution in the value of property resulting from economic factors does not give rise to a deductible loss. In the case of a casualty loss where the damage is not repaired, it is the diminution of value (limited, of course, to the amount of the adjusted basis of the property) that constitutes the proper measure of the loss. See *Rosenthal* v. *Commissioner*, 416 F. 2d 491 (2d Cir. 1969).

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